Supreme Court, U.S.
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In The

Supreme Court of the United States

WILLIAM ROBERTSON, CYNTHIA CARLISLE, RUSSELL HATHHORN, CHRISTOPHER MYERS, MICHAEL SIMPSON, JANET BOWLER, LARRY DEAN, and JEAN DEJARNATT,

Petitioners,

v.

GOVERNOR THEODORE KULONGOSKI (Official Capacity), DAWN MORGAN (Official Capacity), JANICE DERINGER (Official Capacity), MARK GARDINER (Official Capacity), JEANNE GARST (Official Capacity), GLENN HARRISON (Official Capacity), TODD SCHWARTZ (Official Capacity), GEORGE RUSSELL (Official Capacity),

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

This case involves the interpretation of a statutory pension contract affecting most public employees in the State of Oregon. Petitioners brought a claim under the Contract Clause of the U.S. Constitution for impairment of contract. The Ninth Circuit Court of Appeals rejected petitioners' claim under the first prong of this Court's Contract Clause analysis and held that the statutory terms Petitioners sought to enforce were not part of the "contract" as defined under the Contract Clause. The court did this despite all parties and the court agreeing that the PERS statute was contractual. The appellate court reached this conclusion by rejecting application of this Court's decision in *United States v. Winstar Corp. et al.*, 518 U.S. 839 (1996). Petitioners now seek review by this Court to determine how statutory contracts are to be interpreted under the Contract Clause. The questions presented are:

1. Does *United States v. Winstar Corp. et al.* establish this Court's method of analysis for statutory contracts under the "Contract Clause," Article I, Section 10, Clause 1, of the United States Constitution once a statutory contract is found to exist under *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

2. May a federal court defer to a state court to interpret a state statutory contract without performing its own independent analysis?

PARTIES TO THE PROCEEDING

Petitioners in this matter are William Robertson, Cynthia Carlisle, Russell Hathhorn, Christopher Myers, Michael Simpson, Janet Bowler, Larry Dean, and Jean Dejarnatt.

Respondents in this matter are Governor Theodore Kulongoski, Dawn Morgan, Janice Deringer, Mark Gardiner, Jeanne Garst, Glenn Harrison, Todd Schwartz, George Russell.

Marion County intervened in this matter and was granted party status.

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PETITION FOR WRIT OF CERTIORARI

Petitioners William Robertson, *et al*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a) is reported at 466 F.3d 1114 (9th Cir. 2006). The opinion of the district court (App., *infra*, 13a) is reported at 359 F. Supp.2d 1094 (D. Or. 2004)

JURISDICTION

The Opinion of the Ninth Circuit Court of Appeals was issued on October 24, 2006. A timely petition for *En Banc* rehearing was denied by that court on December 7, 2006. This court has jurisdiction over this matter pursuant to the United States Constitution and 28 U.S.C. Sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent statutes and constitutional provisions are reproduced in the Appendix. The statutes involved are Or. Rev. Stat. Ann. 238.300, Or. Rev. Stat. Ann. 238.200(1)(a), and Or. Rev. Stat. Ann. 238.250 (2001). The constitutional provision is the Contract Clause. United States Const. Art. I, § 10, cl. 1. ("No State shall ... pass any ... Law impairing the Obligation of Contracts.")

STATEMENT

In this case, the Court is asked to determine what the appropriate method of analysis is for interpreting statutory contracts under the Contract Clause. At stake is a loss of over one-billion dollars in pension benefits for Oregon public employees. The State of Oregon redirected employee contributions away from pension accounts ("regular accounts") and thereby denied Oregon public employees the full benefits calculated based upon that account. Instead, these mandatory employee contributions were directed to a new account which provides a reduced retirement benefit. Thus, there is no factual dispute that the legislative change materially alters the retirees' pension benefits.

It is undisputed that the PERS statute itself vests public employees with a contract right. The question before the courts has been which portions of that statute are part of that contract. The Ninth Circuit held that the terms of the benefit based upon the original "regular account" was contractual, but the ability to make contributions into the regular account was not. The Ninth Circuit adopted a standard of interpretation which requires evidence of the legislature's "clear intent" that a specific term of the statute would not be altered, even where the term is found in a larger statutory contract and where that term has a direct effect on the level of benefit. The Ninth Circuit rejected the application of *United States v. Winstar Corp. et al.*, 518 U.S. 839 (1996) to interpretation of statutory contracts under the Contract Clause. As a result under the Ninth Circuit's decision, these public employees' pensions are subject to change, or possibly elimination, mid-career. This holding batters the foundation of the public pension system in this country.

A. Statutory Background

The Oregon Public Employee Retirement System ("PERS") is a defined-benefit system, which is funded by employer contributions, employee contributions, and earnings. ER-Tab 46, p. 5.[1] Under the PERS statute, retiree benefits are the greater of three different retirement calculations: (1) full formula; (2) pension-plus annuity; or (3) money match. Or. Rev. Stat. Ann. § 238.300 (2001); ER-Tab 46, pp. 6-7. PERS calculates a retiree's benefits under each of these formulas and the retiree receives a monthly benefit based on the method which produces the highest benefit. *Id.* For a number of years, money match has been the most favorable method of calculating members' retirement benefit. ER-Tab 25, pp.125-128. The primary goal and effect of the 2003 legislature when it passed this legislation was to diminish the money-match retirement benefit.[2] The legislature did not change the money match calculation directly but rather focused primarily on reducing the amount in members' accounts and thereby reduced the calculated benefit.

Before the 2003 legislation, petitioners were entitled to a money-match benefit calculated based on the following:

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[1] Record citations follow the abbreviations used in the Court of Appeals for the Excerpts of Record (ER), Supplemental Excerpts of Record (SER), Clerk's Record (CR), and Reporter's Transcript (RT).

[2] "Whereas unless steps are taken to reform and stabilize PERS, the costs of paying for retirement benefits will continue to grow" Preamble to HB 2003 (2003), ER-Tab 25, p.3.

(1) A employee account ("regular account') in which the member's mandatory six-percent of salary contribution was deposited; Or. Rev. Stat. Ann. § 238.200 (2001); Or. Rev. Stat. Ann. § 238.250 (2001).

(2) The employee account was guaranteed an annual credit of earnings at least equal to the actuarially determined assumed earnings rate. Or. Rev. Stat. Ann. § 238.255 (2001). This rate has been eight-percent since 1989. ER-Tab 58, pp.11, 16.

(3) A member also had the option to invest a percentage of his contributions into a "variable account" invested entirely in equities. Or. Rev. Stat. Ann. § 238.260(3)(2) (2001). The variable account did not have the earnings guarantee of the regular account but, due to the nature of the investments, had a higher likelihood of growth. ER-Tab 46, p.5. Prior to retirement a member could move the variable account balance into the regular account. Or. Rev. Stat. Ann. § 238.260(14) (2001).

(4) After retirement monthly retirement benefit payments were adjusted annually to reflect cost of living adjustments (COLA). Or. Rev. Stat. Ann. § 238.360 (2001).

As a result of the 2003 PERS Legislation, the following changes were made:

(1) Petitioners can no longer contribute six-percent into their regular accounts; ER-Tab 25, pp. 4-5.

(2) Petitioners are no longer entitled to receive annual guaranteed earnings on their regular accounts; ER-Tab 25, p. 10.

(3) Employees are still required to contribute six-percent of their salary, but those funds are no longer placed in the regular account. Instead, employee contributions are placed in an Individual Account which is not guaranteed any earnings and does not receive a cost-of-living adjustment.

(4) Petitioners could no longer invest in the Variable Account. ER-Tab 25, p. 6.

Thus, as a result of these changes, Petitioners' retirement benefits under the money-match calculation were reduced. ER-Tab 46, pp. 10-11. This reduction in the money-match benefit constitutes an impairment of Petitioners' contract rights to receive the pre-2003 legislation money-match benefit as a minimum retirement benefit.

B. Proceedings Below and Parallel State Court Proceedings

Initially in this action, Petitioners challenged all of the 2003 changes to the PERS statute. The District Court issued an opinion on summary judgment finding that none of the PERS statute was contractual as to any future benefit under the Contract Clause. The District Court held that: "The court finds nothing in Or. Rev. Stat. Ann. §§ 238.200, 238.205 and 238.250 giving plaintiffs a right to a fixed level of future PERS benefits." ER-Tab 55, p. 8.

While this matter was on appeal to the Ninth Circuit the Oregon Supreme Court issued an opinion finding that certain portions of the 2003 legislation did impair PERS members'

contracts.[3] *Strunk v. Public Employee Retirement Board*, 108 P.3d 1058 (Or. 2005). In *Strunk,* the court held that HB 2003, Sections 5-8 and Section 10(3)(last sentence) impaired or breached members' PERS contracts and declared them void. The court held:

(1) PERS members are guaranteed an annual rate of return on their regular account; and

(2) PERS retirees are guaranteed COLA increases.

As a result, the appeal of several of the claims in this case were rendered moot. Therefore, the only issue before the Court of Appeals was whether the redirection of the employee contributions to a new account was an impairment. More specifically, the only issue on appeal was whether Petitioners had a contractual right to make contributions into the regular employee account.

The petitioners in *Strunk* had also challenged this redirection of employee contributions under State law. However, the Oregon Supreme Court held that the right to make contributions into the regular account was not contractual based upon the legislative history of that provision. The Oregon court based its conclusion on the lack of "clear and unambiguous" promissory language in those provisions.

The Ninth Circuit then issued an opinion which relied heavily on *Strunk*. Although recognizing that federal courts

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[3]This State Court suit was brought under direct review provisions of the 2003 legislation itself. The Petitioners in that case challenged the legislation under the Oregon State Constitution's Contract Clause, as well as alleging a breach of contract.

must exercise independent authority from state courts in interpreting state contracts, the appellate court deferred entirely to the *Strunk* court's analysis and review of the record. Notably, the state court record was not part of this appeal since this matter was resolved purely on a textual reading of the statutes by the District court judge.

REASONS FOR GRANTING THE PETITION

This Court should grant *certiorari* in this case because the question presented is of exceptional importance. At issue is the method for interpreting statutory contracts under the Contract Clause and the role of a State's highest court in interpreting its own state statutory contract. The Court of Appeals has decided an important question of federal law that has not been settled by this Court. To the extent this Court's decision does address the appropriate method of contract interpretation under the Contract Clause, the appellate court's decision conflicts with that decision.

A. *United States v. Winstar Corp.* Applies Whenever a Federal Court Is Required to Interpret a Governmental Contract

The question presented asks this Court to determine whether its *Winstar* case applies to interpretation of statutory contracts. *United States v. Winstar Corp. et al.*, 518 U.S. 839, 116 S.Ct. 2432 (1996). There is no dispute that the state pension statute at issue is contractual in nature. The appellate court rightly relied on this Court's decision in *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505 (1977) to make that holding. Specifically, the court stated:

> "Clearly, under Oregon law, "PERS is a contract between the state and its employees." However, whether the parties had a contract is not at issue here. Rather, like the Oregon Supreme Court in *Strunk*, we are called upon to determine the *contours* of the Employees' PERS contract." (Emphasis in original, citations omitted).

(App. *infra* 8a.)

Thus, this case squarely presents the question as to the type of analysis that is appropriate to determine the "contours" of a statutory contract.

The Court of Appeals rejected Appellants' argument that *Winstar* was the touchstone for "interpreting" the statutory contract. The Ninth Circuit held:

> "We also reject the Employees' argument that *United States v. Winstar,* 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), provides the standard for determining the contours of a statutorily-created contract because, unlike *National Railroad Passenger Corp., Winstar* did not involve the interpretation of such a contract."

(App. *infra* 10a)

Under the *Winstar* analysis the initial inquiry is to determine whether the alleged term of the contract affects a sovereign power. Where sovereign power is implicated the contractual nature of the term must be "unmistakable." Where sovereignty

is not implicated, standard rules of contract interpretation apply. *Winstar,* 518 U.S. 578-579.

Instead, the appeals court applied a standard more stringent than either of the methods of contract interpretation mandated by *Winstar*. As a result of the Court of Appeals' failure to apply *Winstar*, the court used the wrong analysis and concluded that absent clear legislative direction in regard to each element of the statute, portions of the statutory contract could be unilaterally altered by the legislature. The Court of Appeals thus required clear intent not to alter each statutory term before a part of the statute can be found to be within the contours of the contract. This clear intent must be found for each statutory term, even where the term materially affects the pension benefit. This "clear intent" standard for determining the "contours" of the contract is contrary to standard methods for interpreting contracts and is even more onerous than this Court's methodology where a sovereign power is implicated under *Winstar*.

The flaw in the panel's decision was that it employed a presumption against contract formation. That presumption is normally only used to determine if a contract exists, as opposed to simply a declaration of legislative policy. The Court of Appeals nonetheless used that presumption to remove statutory terms from that contract. The source for the use of this presumption was language in *National R.R. Passenger Corp. v. Atchison Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 465-466, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985) discussing the presumption against finding the existence of a contract.

> "Thus, the party asserting the creation of a contract must overcome this well founded presumption, *Dodge, supra*, 302 U.S., at 79, 58

> S.Ct., at 100, and we proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation."

National Railroad, at 465-466, 105 S.Ct. 1441.

Taking this language at face value, *National Railroad* simply requires caution in determining the contours of the statutory contract, not the "clear indication" of intent necessary to overcome the presumption against finding a statutory contract. The question is what did this Court mean when it counseled caution in determining the contours of a statutory contract.

National Railroad provides no help in answering this question because this Court determined in the first instance that the statute at issue did not create a contract. Thus, it was never required to explain what it meant by exercising "caution" in determining the contours of the obligation.

However, the application of the "unmistakability" doctrine to governmental contracts is thoroughly explored by this Court in *Winstar* beginning with the origins of that doctrine in *Fletcher v. Peck*, 6 Cranch 87, 135, 3 L.Ed. 162 (1810). After exploring the development of that doctrine in Constitutional Contract Clause analysis, it rejects the application of that doctrine in determining the scope of a contract which does not implicate the sovereign powers of the state. Thus, in *Winstar*, this Court applied ordinary contract construction principles in determining that the government was liable in taking action inconsistent with its statutory obligations.

The panel in *Robertson* dismisses *Winstar* by stating that it did not involve interpretation of a statutory contract. However, a careful reading of *Winstar* reveals that this Court made no distinction in its analysis of the unmistakability doctrine in citing cases based on statutory and non-statutory contracts.[4] Even though *Winstar* did not involve a statutory contract, its rationale that there is no place for the unmistakability doctrine in construing ordinary government contracts is equally applicable to determining the terms of an acknowledged statutory contract.

Reconciliation of *National Railroad* and *Winstar* is easily accomplished. The sound policy reasons reflected in *National Railroad* for presuming that statutes are non-contractual do not apply once that burden is met and a contract is found. Once a contract is formed there is no reasoned distinction between the statutory contract and those governmental contracts interpreted in *Winstar*. Certainly, under both *Winstar* and *National Railroad*, sound caution must be exercised in interpreting the contract and deciding what the terms of that contract are. However, that caution is accomplished by this Court's approach in *Winstar* which protects the government's need to protect its sovereign power, but also protects those who enter into government contracts.

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[4]The *Winstar* Court noted that in sovereign power cases "both [the contract's] existence and the authority to make it must clearly and unmistakably appear." (*Winstar*, at 889). Thus in sovereign power cases the court will make a dual inquiry ultimately indistinguishable from the inquiry of whether the legislature intended to create contract rights.

B. Application of *Winstar* in the Case Would Have Changed the Outcome

1. Appellants Seek to Prevent a Change to a Material Term of their Pension

If the central legal inquiry for the panel was to determine whether the statutory sections providing for employee contributions and payment into an employee "regular account" were material terms of the PERS benefit, then the conclusion would be obvious. The employee account is a fundamental aspect of that contract because that account determines in whole or in part two of the three optional formulas for determining retirement benefits. It is undisputed that PERS members are contractually entitled to a pension benefit from whichever of those three formulas produces the higher benefit.[5] Thus, by any standard, the ability to make contributions into the account, which then determines the pension payment, is "material" to the pension benefit.[6] The

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[5]The panel states that the legislature did "promise to the Employees simply that they "would receive service retirement allowances calculated under whichever formula yields the highest pension amount for that member." *Id.* at 1085.

[6]There is no logical or textual means to distinguish parts of the PERS statute – some of which the panel found contractual, the other it did not. Both are part of the PERS Statute (Or. Rev. Stat. Ann Chapter 238); both are dependent on the other, and both are material to a determination of the members' pension benefit. A comparison of the two provisions of the PERS statute – the first found to be contractual by the panel, and the second not – produces no discernable difference in the language of the statute.

Or. Rev. Stat. Ann. 238.200(1)(a) provides:

"(1)(a) An active member of the system shall contribute to the fund, and there shall be withheld from salary of

issue in this case is whether the State has the right to unilaterally alter that material term of the pension benefit by defining it as outside of the PERS contract.

Under *Winstar*, this court directs that normal rules of contract interpretation apply in interpreting contracts. Those normal rules of statutory construction require the following:

> "The time for determining materiality is the time of the breach and not the time that the contract was made .... Most significant is the extent to which the breach will deprive the injured party of the benefit that it justifiably expected."

E. Farnsworth, Contracts § 8.16 (3d ed. 1999) cited by *Mobil Oil Exploration and Producing Southeast, Inc. v. U.S.*, 530 U.S. 604 (2000).

In this case, there can be no question that if any of the courts had applied normal rules of contract interpretation, contributions to the regular account must be part of the PERS contract. However, the Court of Appeals and District Court did not apply normal rules of contract interpretation. Rather, both courts required some sort of promissory language to be found

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the member six percent of that salary.
Or. Rev. Stat. Ann. 238.250 provides:
"The Board shall provide for a regular account for each active and inactive member of the system who has made a contribution to the fund. The regular account of the member shall show the amount of the member's contribution to the fund and the interest which they have earned . . ."

in each statutory section and subsection before it is found to be contractual. This method is contrary to *Winstar*.

2. A Waiver of the State's Ability to Abrogate Its Own Contract, Statutory or Otherwise, Is Never a Waiver of Sovereignty, and Therefore Need Not Be Unmistakable

Petitioners recognize that this PERS contract is not an ordinary contract. Rather, it is a statutory contract between public bodies and their employees. Petitioners concede that any term of the contract which surrenders an element of sovereignty must be "unmistakable." *Winstar*, 518 U.S. 839. This is a proposition that goes back to the Marshall Court. *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837). Thus, the only reason that the statutory sections at issue in this case should be subject to a heightened standard of interpretation is if they implicate a sovereign power under *Winstar*.

Certainly, a simple agreement to pay a pension does not implicate a sovereign power. The only aspect of the alleged contract terms that could implicate an attribute of sovereignty is that as a contract, the legislature cannot change those terms. However, the right to change one's own contracts is never a sovereign right, even if the method of abrogating that right is an attribute of sovereignty, i.e. legislation, taxation, etc. *See Fletcher v. Peck*, 10 U.S. 87, 135 (1810)(abrogation through legislation is an impairment); *Piqua Branch of State Bank of Ohio v. Knoop*, 57 U.S. 369 (1853)(abrogation through taxation is an impairment). Absent an explicit reservation of such an extraordinary right, courts will assume that a public body meant what it said in its contract and did not retain the right to change the contract.

Thus, a waiver of the State's right to abrogate its own contracts *via* legislation is not a waiver of sovereignty at all, even where such a term restricts taxation. Rather, such an implied waiver is simply an essential element of the contract to which the public body has necessarily assented. This is common sense - in order for the promise of a pension benefit, due after 30 years of service, to have any meaning, the promisor must also promise not to change that benefit mid-career. If it were otherwise all statutory contracts would be rendered illusory by presuming that the State reserved its power to unilaterally change the terms of the contract at will. Such an extraordinary implied reservation under the disguise of protecting sovereignty would be absurd.

3. Normal Rules of Contract Interpretation Result in a Holding That a Material Term that Establishes a Contractual Benefit Cannot be Altered Unilaterally

It is a fundamental element of all contracts that neither party can materially alter their contracts unilaterally. This is especially true in the context of a unilateral contract where one party accepts that contract through his or her performance. Support for this proposition can be found in basic contract law and the accepted law of unilateral contracts.

First, it is the fundamental nature of a contract that one party cannot have the unilateral discretion to excuse its own performance. If it were otherwise, the contract would be wholly illusory. See 1 R. Lord, *Williston on Contracts* § 1:2, p. 11 (4th ed.1990).

Moreover, under generally accepted canons of contract interpretation every contract has an implied covenant that one party will not act to deny the other party the benefits of the contract.

> "Generally, contract law imposes upon a party to a contract liability for any impossibility of performance that is attributable to that party's own actions. That is a reasonable estimation of what the parties intend."

United States v. Winstar Corp. et al., 518 U.S. at 920 (1996), (Scalia, J., concurring).

Finally, and most relevant to this case, in the context of the unilateral contract part performance by one party implicitly prevents the other party from changing the material terms of the contract. Restatement (Second) of Contracts § 45 provides:

> "(1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it. (2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer."

Thus, Petitioners argue that as part of their employers' offer of a pension the State agreed not to change the material terms of that contract while Petitioners were in the midst of performing their end of the bargain.

This is a principle that the Court has recognized in unilateral statutory contracts for over a century. For instance, in *Houston & T.C Railroad Co. v. State of Texas*, 170 U.S. 243, 18 S.Ct. 610 (1898), the State of Texas chartered a railroad for the purpose of building a certain stretch of track. The initial charter statutes promised Plaintiff companies land grants associated with each mile of track they built. All these rights were pursuant to statutory contracts.

After the purchase, but before the completion of the branch line, the State, by statute, rescinded its prior statutory offer to grant certain land for every mile of track constructed. The court found an impairment and concluded that the railroad had a right not just to the land associated with track built at the time of the statute changing the deal, but also to land grants for un-built track contingent on completion of said track. Because the railroad initiated construction on the branch line in reliance on the statutory promise of particular land grants associated with future construction, the State could not withdraw that offer.

Thus, the Court held that a unilateral statutory contract cannot be changed through subsequent legislative action unless the State has reserved that right explicitly. *Houston v. T.C. Railroad*, 170 U.S. at 255. Perhaps most importantly, the Court made this holding even though there was no language explicitly preventing future statutory change. *See also Fletcher v. Peck*, 10 U.S. 87, 135 (1810) (holding that a State can no more pass a law abrogating its own contracts than it can breach its contracts outright.)[7]

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[7] Justice Marshall in *Fletcher* held: "But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those

4. Under the *Winstar* "Unmistakability" Standard, It Is Still Unmistakably Evident that a State Cannot Unilaterally Alter Material Terms of its Own Contract

Under *Winstar's* unmistakability analysis a state is not presumed to have an implicit right to unilaterally change its own contracts. The Court's most recent analysis applying the "unmistakability" test in this context comes from Justice Scalia's concurrence in *Winstar*. (Joined by Justices Thomas and Kennedy). In *Winstar,* the primary dispute between the plurality and the concurrence concerned whether an implied agreement limiting the government's ability to regulate Petitioners in the future implicated a sovereign power. The plurality found that it did not, and thus, held that the unmistakability doctrine did not apply and analyzed the case under a straight forward contract analysis. This is the same conclusion that Petitioners asked the appellate court to adopt in this case.

Justices Scalia, Thomas, and Kennedy, on the other hand, would have held that such an agreement did implicate a sovereign power, and thus was subject to interpretation under the unmistakability doctrine. As Justice Scalia pointed out, the key difference between viewing the contract with and without

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conveyances have vested legal estate, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community." 10 U.S. at 135.

the unmistakability prism is that in matters of sovereignty, the government is not presumed to have waived its powers to affect the contract incidentally, whereas where sovereignty is not implicated, the government is presumed to have waived its rights to change that contract. *Winstar,* 850 U.S. at 920 (Scalia, J., Concurring). Of course, each of those presumptions can be overcome through interpretation of the text and circumstances of the contract.

As explained above, where the alleged waiver of the right to legislate simply concerns the power to abrogate material terms of the contract, no waiver of sovereignty is implicated. However, even if a waiver of sovereignty were necessary under an application of the unmistakability doctrine, this Court should still conclude that the State of Oregon waived its right to change the PERS contract mid-career. Thus, Petitioners would succeed under the *Winstar* concurrence's analysis as well as the majority's.

Justice Scalia stated:

> "If, as the dissent believes, the Government committed only "to provide [certain] treatment unless and until there is subsequent action," post, at 2484, then the Government in effect said "we promise to regulate in this fashion for as long as we choose to regulate in this fashion"--which is an absolutely classic description of an illusory promise. See 1 R. Lord, Williston on Contracts § 1:2, p. 11 (4th ed.1990). In these circumstances, it is unmistakably clear that the promise to accord favorable regulatory treatment must be understood as (unsurprisingly) a promise to accord favorable

> regulatory treatment. I do not accept that unmistakability demands that there be a further promise not to go back on the promise to accord favorable regulatory treatment."

Id., at 921.

Yet, this is exactly what the lower court in this case required before it would find that Petitioners had a right to be free from pension changes during their careers. Under *Winstar*'s unmistakability analysis, there is no need to have a further promise not to go back on the earlier promise because this is a fundamental term of the contract. In this case, the promise to provide a pension benefit determined by contributions and earnings at a set rate, was, in fact, (unsurprisingly) a promise to provide a pension benefit determined by contributions and earnings at a set rate. The promise is unmistakable. Without that presumed intent, the contract would be illusory. Justice Scalia went on to hold:

> "Indeed, it is hard to imagine what additional assurance that the course of regulation would not change could have been demanded--other than, perhaps, the Government's promise to keep its promise. That is not what the doctrine of unmistakability requires. While it is true enough, as the dissent points out, that one who deals with the Government may need to " 'turn square corners,' " post, at 2485 (quoting *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143, 41 S.Ct. 55, 56, 65 L.Ed. 188 (1920)), he need not turn them twice."

Id.

Yet, this is exactly what the Appellate court demands of Petitioners, a showing of a promise to keep a promise. Under the circumstances presented here and the context of a unilateral pension contract, no such second promise was necessary to prevent the State from changing the terms of its unilateral pension offer mid-career.

C. The Appellate Court Failed to Perform an Analysis of the PERS Contract, Independent of the State Court

The Federal Courts are charged with performing their own independent analysis of the existence and contours of contracts under the Contract Clause. This Court in *State of Indiana ex rel Anderson v. Brand*, counseled as follows:

> "On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the state's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation."

State of Indiana ex rel Anderson v. Brand, 303 U.S. 95, 100 (1938)(emphasis added). However, in this case, the Court of Appeals deferred entirely to the Oregon Supreme Court to interpret the PERS Contract.

The Ninth Circuit panel had none of the record available to the *Strunk* court. *Robertson*, at 4 *citing Strunk v. Public Employees Retirement Board*, 338 Or. 145, 08 P.3d 1058, 1068

(2005). As a result, the panel relies entirely on the state court's factual conclusions regarding legislative intent. Those factual conclusions regarding legislative intent involve not only the textual reading applied by the District court, but a review of the timing of legislative proposals, legislative history, and previous versions of the statute. None of this information was in the record and thus none of it could have been reviewed by the appellate panel.

As a result, this panel's approach renders the Contract Clause a constitutional dead letter. *State of Indiana ex rel. Anderson v. Brand*, 303 U.S. at 100 (1938). By allowing State courts' to be the arbiter of the contours of the State's own contractual obligations, the Contract Clause lends little protection to the reasonable contractual expectations of State employees.

CONCLUSION

At issue in this case is how the Federal Courts are to interpret statutory contracts for purposes of the Contract Clause. It is undisputed that the Oregon public pension statute, as a whole, is contractual. However, the Court is presented in this case with a dispute as to whether several sections of that statute are part of that contract. Despite agreeing that certain portions of the PERS statute, not at issue in this case, were contractual under state law, the Court of Appeals applied an exceedingly high standard and found that the disputed sections at issue in this case were not part of the contract. The Court of Appeals required that evidence of "clear legislative intent" to bind the state, be found in each statutory section. The court required this language be found in each statutory section, even though those sections established the benefit already determined to be contractual.

The lower court rejected petitioners' insistence that this Court's decision in *United States v. Winstar et al*, controlled. *Winstar* requires that normal rules of contract interpretation apply once a contract has been found. If that court had applied *Winstar*, it would have applied normal rules of contract interpretation. It would have concluded that material terms of the PERS statute were necessarily part of the PERS contract. Therefore, this Court should grant *certiorari* and announce that the *Winstar* plurality is in fact this Court's preferred analysis for statutory contracts under the Contract Clause.

Respectfully submitted this 7th day of March, 2007.

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APPENDIX A

United States Court of Appeals, Ninth Circuit.

William ROBERTSON; Cynthia Carlisle; Russell Hathhorn; Christopher Myers; Michael Simpson; Janet Bowler; Larry Dean; Jean Dejarnatt, Plaintiffs-Appellants, Marion County, Intervenor-Appellee,

v.

Theodore KULONGOSKI; Dawn Morgan, Official capacity; Janice Deringer, Official capacity; Mark Gardner, Official capacity; Jeanne Garst, Official capacity; Glenn Harrison, Official capacity; Todd Schwartz, Official capacity; George Russell, Official capacity; Public Employees Retirement Board, Defendants-Appellees.

No. 04-35898.

Argued and Submitted Sept. 15, 2006.
Filed Oct. 24, 2006.

***1115** Gregory A. Hartman, Bennett, Hartman, Morris & Kaplan, Portland, OR, for the plaintiffs-appellants.
Jeremy D. Sacks, Stoel Rives, Portland, OR, for the defendants-appellees.

Appeal from the United States District Court for the District of Oregon; Michael W. Mosman, District Judge, Presiding. D.C. No. CV-03-00999 MWM.

Before: SILVERMAN and GOULD, Circuit Judges, and RHOADES,[FN*] District Judge.

FN* The Honorable John S. Rhoades, Sr., Senior United States District Judge for the Southern District of

California, sitting by designation.

RHOADES, District Judge:

Plaintiffs-Appellants ("the Employees"), current and retired employees of the State of Oregon, challenge legislation [FN1] passed by the Oregon legislature in 2003 that amended the Oregon Public Employees Retirement System ("PERS"). The Employees bring their claims under the Contract Clause of the United States Constitution. The Employees appeal the district court's denial of their motion for summary judgment and grant of summary judgment in favor of defendants-appellees (collectively "the State"). Only the Employees' First and Sixth Claims remain at issue.[FN2]

FN1. *See* House Bill 2003 (2003), Oregon Laws 2003, chapter 67.

FN2. As the Employees note in their Supplemental Opening Brief, their Second, Third, Fourth and Fifth Claims are moot in light of the Oregon Supreme Court's holding in *Strunk v. Public Employees Retirement Board,* 338 Or. 145, 108 P.3d 1058 (2005). Moreover, the Employees have specifically withdrawn their appeal of the district court's decision regarding their Third, Seventh, Eighth, Ninth and Tenth Claims. Although the Employees contend that this appeal is now "limited to the diversion of employee contributions from employee regular accounts"-which could be construed as a representation that only the First Claim remains at issue-because the Employees' Sixth Claim is not moot and the Employees do not specifically withdraw their appeal as to that claim, we consider it here.

I. The Oregon Public Employees Retirement System

"Oregon has provided its public employees with a retirement plan, as a contractual benefit of public employment, since 1945." *Strunk v. Public Employees Retirement Board,* 338 Or. 145, 108 P.3d 1058, 1068 (2005). Prior to the 2003 legislation, PERS members contributed six percent of their salaries to the PERS fund, *see* O.R.S. 238.200(1)(a) (2001), and the contributions to the fund were then directed to either a "regular" account or a "variable" account. *See* O.R.S. 238.200(2) (2001); O.R.S. 238.260(3) (2001); *Strunk,* 108 P.3d at 1079-80, 1095-96. Earnings on contributions to the regular accounts were credited to those accounts. *See Strunk,* 108 P.3d at 1071. Since 1975, the PERS statutory scheme has "provided that the earnings to be credited annually to Tier One members' regular accounts will be no less than the existing assumed earnings rate." [FN3] *Id.* at 1087; *see also* O.R.S. 238.255 (1995).

> FN3. PERS classifies Oregon employees into two "tiers." "Tier One" members are those whose membership in PERS began before January 1, 1996. *See Strunk,* 108 P.3d at 1069. All plaintiffs in this action are Tier One members or retired Tier One members.

***1116** As for the calculation of the members' benefits at retirement, the Oregon Supreme Court has explained:
There are three formulas available for calculating a PERS member's service retirement allowance, commonly known as the Pension Plus Annuity, the Full Formula, and the Money Match. The Pension Plus Annuity, which is available to only members who contributed to PERS before August 21, 1981, consists of the sum of an annuity component and a pension

component. The annuity component is composed of the actuarial equivalent of the member's account balances at retirement. The pension component, funded by the employer, is equal to one percent of the member's final average salary (1.35 percent for legislators and police and fire employees) for each service year.

The Full Formula also includes an annuity component composed of the actuarial equivalent of the member's account balances at retirement and a pension component; however, the pension component is calculated differently than under the Pension Plus Annuity. The Full Formula first calculates a member's service retirement allowance by multiplying the member's final average salary by a factor set at 1.67 percent (two percent for legislators, police officers, and firefighters) and then multiplying the resulting figure by the member's years of membership. That service retirement allowance then is funded using the actuarial equivalent of the member's account balances at retirement (the annuity component) and employer contributions required to make up the difference (the pension component).

Under the Money Match, a member's service retirement allowance is calculated by determining the sum of the actuarial equivalent of the member's account balances at retirement (the annuity component) and then adding a sum in an equal amount that is charged to the employer, i.e., the "match" (the pension component). The resulting service retirement allowance therefore amounts to twice the actuarial equivalent of the member's account balances at retirement.

Strunk, 108 P.3d at 1069-70. Upon retiring, "a PERS member receives a service retirement allowance based on the formula that produces the highest pension amount among the foregoing three alternative formulas." *Id.* at 1070; *see also* O.R.S. 238.300 (2001). Prior to 2003, a retired member's service

retirement allowance was increased annually through a cost-of-living adjustment ("COLA") regardless of the formula used to determine the allowance. *Strunk,* 108 P.3d at 1070.

Under the challenged 2003 legislation, Tier One members no longer have the option of contributing to the regular or variable accounts. Rather, all member contributions made after January 1, 2004, are now placed in a new Individual Account Program ("IAP") account. *See id.* at 1071-72. Importantly, unlike the balances in the regular accounts, "[t]he balances held in members' IAP accounts will not be annually credited at not less than the assumed earnings rate and, at retirement, will not be subject to employer matching under the Money Match or be enhanced by annual COLAs." *Id.* at 1072.

The statutory provisions regarding how benefits are calculated under the Pension Plus Annuity, the Full Formula and the Money Match were not altered by the 2003 legislation. However, the effect of the 2003 legislation is that Money Match will not be the predominant formula for calculating PERS retirement allowances, which it has been in recent years. *Id.* at 1070 n. ***1117** 18. The Money Match in recent years has provided generous retirement allowances. For example, in 2000, "the average PERS retired member with 30 years of creditable service retired at the age of 53 with a service retirement allowance equal to 106 percent of the member's final average salary." *Id.* at 1070.

II. Analysis

In broad terms, the Employees contend that they have a contractual right to participate in the PERS pension plan as it existed prior to the challenged 2003 legislation and that the

2003 legislation violates the federal Contract Clause by impairing the State's obligations to them under the pre-2003 PERS statutory scheme. Specifically, the Employees' First Claim challenges the fact that the 2003 legislation eliminates the Employees' right to contribute six percent of their salaries to a regular account, *see* O.R.S. 238.200(4), redirects the Employees' contributions to an IAP account, *see* O.R.S. 238A.305(1) (2003); O.R.S. 238A.330 (2003), and effectively eliminates the Money Match as the primary formula for calculating member service retirement allowances. The Employees' Sixth Claim challenges the fact that the 2003 legislation eliminates their right to contribute to a variable account.

The federal Contract Clause provides: "No State shall ... pass any ... Law impairing the Obligation of Contracts." United States Const. art. I, § 10, cl. 1. To determine whether a legislative enactment violates the Contract Clause, the panel must engage in a three-part analysis. *Rui One Corp. v. City of Berkeley,* 371 F.3d 1137, 1147 (9th Cir.2004). The first part of the analysis, which is at issue here, is " 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " *Id.* (quoting *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978)). In making this determination, the court must consider "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial.' " *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 186, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992). Importantly, "[t]he first sub-inquiry is not whether any contractual relationship whatsoever exists between the parties, but whether there was a 'contractual agreement *regarding the specific ... terms allegedly at issue.*' " *Rui One Corp.,* 371 F.3d at 1147 (quoting *Romein,* 503 U.S. at 187, 112 S.Ct. 1105)

(emphasis added); *see also State of Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 100, 58 S.Ct. 443, 82 L.Ed. 685 (1938).

In determining the contours of the statutorily-created PERS contract, we apply federal law, *see State of Nev. Employees Ass'n, Inc. v. Keating,* 903 F.2d 1223, 1227 (9th Cir.1990); *Brand,* 303 U.S. at 100, 58 S.Ct. 443, which requires us to find a "clear indication" of the Oregon legislature's intent that the State be contractually bound by the provisions of PERS that the Employees urge us to find are contractual promises. *National R.R. Passenger Corp. v. Atchison Topeka and Santa Fe Ry. Co.,* 470 U.S. 451, 465-466, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985) (emphasis added). As explained in *National Railroad Passenger Corp.:*

For many decades, this Court has maintained that *absent some clear indication that the legislature intends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." Dodge v. Board of Education,* 302 U.S. 74, 79, 58 S.Ct. 98, 100, 82 L.Ed. 57 (1937). *See also Rector of Christ* ***1118** *Church v. County of Philadelphia,* 24 How. 300, 302, 16 L.Ed. 602 (1861) ("Such an interpretation is not to be favored").

This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 104-105, 58 S.Ct. 443, 447-448, 82 L.Ed. 685 (1938). Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.... Thus, the party asserting the creation of a contract must overcome this well-founded presumption, *Dodge, supra,* 302

U.S., at 79, 58 S.Ct., at 100, and *we proceed cautiously* both in identifying a contract within the language of a regulatory statute and *in defining the contours of any contractual obligation.*

Id. at 465-466, 105 S.Ct. 1441. (emphasis added).[FN4]

> FN4. The Employees attempt to draw a distinction between the standard for ascertaining the legislature's intent to be bound by a contract in general and the standard for ascertaining its intent regarding the terms of the contract. The Employees contend that once it is determined that the legislature intended to create an enforceable contract we need not apply a heightened standard in determining the terms of that contract. However, we have not been cited any authority that so holds, and this contention cannot be reconciled with the passage we cite from *National Railroad Passenger Corp.*

Finally, although we apply federal law in ascertaining the State legislature's intent to bind the state contractually, we must accord "respectful consideration and great weight to the views of the State's highest court...." *Romein,* 503 U.S. at 187, 112 S.Ct. 1105 (quoting *Brand,* 303 U.S. at 100, 58 S.Ct. 443); *see also Phelps v. Bd. of Educ. of Town of West New York,* 300 U.S. 319, 322, 57 S.Ct. 483, 81 L.Ed. 674 (1937); *Dodge v. Bd. of Educ. of City of Chicago,* 302 U.S. 74, 79, 58 S.Ct. 98, 82 L.Ed. 57 (1937).

Clearly, under Oregon law, "PERS is a contract between the state and its employees." *Oregon State Police Officers' Ass'n v. State,* 323 Or. 356, 918 P.2d 765, 779 (1996). However, whether the parties had a contract is not at issue here. Rather,

like the Oregon Supreme Court in *Strunk,* [FN5] we are called upon to determine the *contours* of the Employees' PERS contract. Having considered *Strunk's* detailed analysis of this issue, which includes a thorough examination of the text and context of all relevant statutory provisions along with an examination of the history of PERS,[FN6] we agree with the Oregon Supreme Court that the Oregon legislature did not promise the Employees a perpetual or "immutable" right to contribute to the regular and variable accounts. *Strunk,* ***1119** 108 P.3d at 1087.

Moreover, the Employees' arguments to the contrary notwithstanding, we also agree with *Strunk* that the legislature "did not promise that PERS would be maintained so that the Money Match remains the primary calculator of member service retirement allowances...." *Id.* at 1085; *see also id.* at 1087. We further agree that the Oregon legislature's promise to the Employees was simply that they "would receive service retirement allowances calculated under whichever formula yields the highest pension amount for that member...." *Id.* at 1085. Finally, we conclude, as did *Strunk,* that "[t]he legislature did not alter or eliminate that promise when it enacted the 2003 PERS legislation." *Id.* at 1087.

FN5. In *Strunk,* PERS members who are not parties to the present lawsuit brought federal and state Contract Clause challenges to the identical 2003 legislative provisions that are at issue here.

FN6. Rather than reiterate the *Strunk* court's analysis, we direct the reader to *Strunk,* 108 P.3d at 1080-87, 1095-98. We do note, however, that, the Employees' contention to the contrary notwithstanding, the *Strunk* court did, as it should, consider the provision regarding contributions to the regular accounts in the context of

> the PERS contract as a whole. *See id.* at 1087 (explaining that "the text of O.R.S. 238.200(1)(a) (2001) *and its statutory context* do not establish clearly and unambiguously that the legislature intended to promise members that they could contribute six percent of their salaries to their regular accounts throughout their PERS membership") (emphasis added).

In reaching this conclusion, we reject the Employees' contention that *Strunk's* analysis is not helpful here because it applied an incorrect standard in determining the legislature's intent. The standard it used-whether there was clear and unambiguous evidence of the legislature's intent-is consistent with the applicable standard under federal law. *See National R.R. Passenger Corp.*, 470 U.S. at 465-66, 105 S.Ct. 1441. We also reject the Employees' argument that *United States v. Winstar,* 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), provides the standard for determining the contours of a statutorily-created contract because, unlike *National Railroad Passenger Corp., Winstar* did not involve the interpretation of such a contract.

The Employees' contention that *Keating,* not *Strunk,* should be the starting point for our analysis is also unavailing.[FN7] Not only does this argument overlook the fact that federal courts accord deference to a state court's determination as to the existence *and terms* of a contract created by state statute, *see Brand,* 303 U.S. at 100, 58 S.Ct. 443; *Phelps,* 300 U.S. at 322, 57 S.Ct. 483, but *Keating* does not provide a framework for determining the terms of a statutorily-created contract.

> FN7. Interestingly, although the Employees now contend that federal law drives the analysis regarding

> the scope of their statutorily-created contract, prior to *Strunk* the Employees relied heavily on Oregon cases such as *Taylor v. Multnomah County Deputy Sheriff's Retirement Board,* 265 Or. 445, 510 P.2d 339 (1973), *Hughes v. State of Oregon,* 314 Or. 1, 838 P.2d 1018 (1992), and *Oregon State Police Officers' Ass'n v. State,* 323 Or. 356, 918 P.2d 765 (1996) in support of their claims. We conclude that nothing in these cases suggests a flaw in *Strunk's* analysis of the specific PERS terms at issue here, which we find to be the correct analysis.

In *Keating,* employees of the State of Nevada and their employee association challenged the Nevada legislature's termination of their right to withdraw their pension contributions without penalty. The State of Nevada did not dispute that a contractual relationship existed between the parties, *see* 903 F.2d at 1226, and notably absent in *Keating* is an analysis as to whether there was a contractual agreement regarding the specific term at issue in that case. Because the seminal issue here is not whether the parties had an agreement but, rather, the terms of that agreement, and because *Keating* is silent as to how this issue should be approached, the Employees' reliance on *Keating* is unavailing here.

Finally, we note that the Employees' remaining arguments are unavailing because they are predicated upon the presumption that the perpetual right to contribute to the regular and variable accounts and the right to have their member service retirement allowances calculated under the Money Match are statutorily-created PERS contractual rights. Because we have found they are not, it is irrelevant whether the Oregon ***1120** legislature could have unilaterally abrogated such contractual rights were they to exist.

III. Conclusion

Having considered the Oregon Supreme Court's detailed analysis of the terms of the Employees' statutorily-created PERS contract, we conclude, as did the Oregon Supreme Court in *Strunk,* that the Employees' PERS contract does not contain the promises urged by the Employees. Accordingly, the 2003 legislation does not impair a term of the Employees' PERS contract and, therefore, does not violate the federal Contract Clause. Accordingly, the district court is AFFIRMED.

APPENDIX B

United States District Court, D. Oregon.

William ROBERTSON, Cynthia Carlisle, Russell Hathhorn, Christopher Meyers, Michael Simpson, Janet Bowler, Larry Dean, and Jean DeJarnett, Plaintiffs,

v.

Governor Theodore KULONGOSKI (Official Capacity), Dawn Morgan (Official Capacity), Janice Deringer (Official Capacity), Mark Gardiner (Official Capacity), Jeanne Garst (Official Capacity), Glenn Harrison (Official Capacity), Todd Schwartz (Official Capacity), George Russell (Official Capacity), Defendants.

No. CV 03-999-MO.

Aug. 19, 2004.

Aruna A. Masih, Gregory A. Hartman, Thomas K. Doyle, Hartman, Morris & Kaplan LLP, Portland, OR, for Plaintiffs. Charles F. Hinkle, Stephen Scott Walters, Stoel Rives, LLP, Townsend Hyatt, *1097 Orrick, Herrington & Sutcliffe, LLP, Portland, OR, Heather L. Reinschmidt, James P. Baker, Virginia H. Perkins, Orrick, Herrington & Sutcliffe, LLP, San Francisco, CA, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

MOSMAN, District Judge.

This case involves the allegation that the PERS reform legislation violates the Contract Clause of the United States Constitution. Defendants move for summary judgment, arguing the statutory changes only implicate future benefits. Plaintiffs move for partial summary judgment arguing the contract created by Oregon Revised Statutes ("ORS") Chapter

238 provides plaintiffs with a right to future benefits for past and future service, which defendants breached.

The court concludes the PERS statutory scheme creates a contract between the State of Oregon and its employees. The Contract Clause, however, is not violated here because plaintiffs fail to show the 2003 amendments to ORS Chapter 238 apply retroactively. For this reason, defendants' Motion for Summary Judgment is GRANTED, while plaintiffs' Motion for Partial Summary Judgment is DENIED.

I. BACKGROUND

The 2003 Oregon Legislative Assembly passed a series of bills, which Governor Kulongoski signed into law, designed to modify the terms of Oregon's Public Employment Retirement System ("PERS"). These laws are known as the PERS Reform and Stabilization Act of 2003 (the "Reform Legislation").

The motivation for the Reform Legislation is stated in the preamble to HB 2003.

Whereas it is the policy of the State of Oregon to provide career public employees adequate and secure retirement benefits at a reasonable, affordable and stable cost to taxpayers; and

Whereas since 1995 the cost to taxpayers of funding the Public Employees Retirement System (PERS) has increased dramatically, with the cost of PERS increasing when PERS investment income was good and the cost of PERS continuing to increase when PERS investment income was poor; and

Whereas PERS now has an unfunded actuarial liability of $16.41 billion, and the burden of eliminating that deficit will fall on the taxpayers unless the causes of that unfunded liability are remedied; and

Whereas as a result of errors by the Public Employees Retirement Board, some retirees are receiving benefits that exceed the benefits provided by law, and the cost of paying for those benefits continues to increase; and
Whereas unless steps are taken to reform and stabilize PERS, the costs of paying for retirement benefits will continue to grow; and
Whereas escalating costs threaten the stability of the Public Employees Retirement Fund and the security of benefits intended for members who have not yet retired....

The preamble continues with a recitation of various court decisions that found computational errors requiring corrections for the PERS benefits to be lawful and secure.

Plaintiffs are current and former employees and "Tier One" [FN1] PERS members, who claim the Reform Legislation violates ***1098** their contractual pension rights. Defendants are the Governor of Oregon and the members of the Public Employees Retirement Board ("PERB") in their official capacity. Plaintiffs brought this action under 42 U.S.C. § 1983, alleging the Reform Legislation violates the Contract Clause, U.S. Constitution, Art. I, § 10, cl. 1. Plaintiffs desire this court to declare the Reform Legislation unconstitutional and enjoin defendants from implementing its changes to PERS. Defendants urge the court to find that no accrued benefits are altered by the Reform Legislation; that future benefits are altered but such future alterations do not violate the Contract Clause.

FN1. "Tier One" members of PERS became members before January 1, 1996. The distinction between Tier One members and non-Tier One members is immaterial to this order.

Oral argument on the motions for summary judgment was held on April 19, 2004. On April 20, 2004, the court requested additional briefing on "how HB 2003 & HB 2004 specifically affect Tier 1 employees' benefits for work performed prior to the effective date of the legislation...." (Minute Order, Docket No. 44, 4/20/04).

II. DISCUSSION: CONTRACT CLAUSE INTERPRETATION

Article I, section 10, clause 1 of the United States Constitution states: "No State shall ... pass any ... Law impairing the Obligation of Contracts." Although its text is "facially absolute," the Supreme Court has long found that the Contract Clause's "prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.' " *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434, 54 S.Ct. 231, 78 L.Ed. 413 (1934)).

The modern usage of the Contract Clause as a check against public contracts was revived by the Supreme Court in *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). In *United States Trust*, the New Jersey legislature sought to repeal legislation that implemented a limitation agreement designed to reassure Port Authority bondholders regarding the financial security of bonds. The Supreme Court found that because the legislature was seeking to relieve the state of its own obligation, no deference to legislative judgment was required. Therefore, the Supreme Court assessed whether the state's action was "necessary and

reasonable." The Supreme Court struck down the law as both unnecessary and unreasonable because alternative means were available to promote the goals sought to be promoted by the legislation.

Since *United States Trust,* courts have developed a three-step scheme for determining whether legislation that involves the contractual obligations of a governmental unit violates the Contract Clause. "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " *Energy Reserves,* 459 U.S. at 411, 103 S.Ct. 697 (quoting *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978)); see also *Rui One Corp. v. City of Berkeley,* 371 F.3d 1137, 1147 (9th Cir.2004). If this threshold inquiry is met, the court must secondarily inquire whether "the State, in justification, [has] a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." This requirement guarantees that "the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserves,* 459 U.S. at 411-12, 103 S.Ct. 697 (citation omitted). Third, the court must inquire "whether the adjustment of 'the rights and responsibilities of contracting parties is based upon reasonable***1099** conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.' " *Id.* at 412, 103 S.Ct. 697 (quoting *United States Trust,* 431 U.S. at 22-23, 97 S.Ct. 1505) (footnote omitted). "Courts defer to a lesser degree when the State is a party to the contract because 'the State's self-interest is at stake.' " *Rui One,* 371 F.3d at 1147 (quoting *United States Trust,* 431 U.S. at 25-26, 97 S.Ct. 1505).

The initial inquiry-whether the state law "has operated as a substantial impairment of a contractual relationship"-itself has

three components. *Rui One,* 371 F.3d at 1147 (internal quotation omitted). A court must first inquire whether a contract exists. If so, the court next must inquire whether the law in question impairs an obligation under the contract. If so, the court then must inquire whether the discerned impairment can fairly be characterized as substantial. *See General Motors Corp. v. Romein,* 503 U.S. 181, 186, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992).

STEP ONE OF THE THRESHOLD INQUIRY: IS THERE A CONTRACT?

The first step in determining whether the Contract Clause prohibits legislation reducing or impairing public retirement benefits is to determine if there is a contract between the state and the employee for the benefits. This determination is made in accordance with state law and the legislation allegedly creating the contract. *See National R.R. Corp. v. Atchison, Topeka Co.,* 470 U.S. 451, 465, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985). If there is no contract, then the Contract Clause does not protect those benefits.

Oregon does not have an explicit constitutional provision regarding the contractual nature of pensions. Likewise, plaintiffs cite nothing in Chapter 238 of Oregon Revised Statutes stating the Oregon pension is contractual. Defendants urge that because PERS is created by statute, there is no presumption of a contractual right to a certain level of PERS benefits. "[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.' " *Atchison,* 470 U.S. at 465-66, 105

S.Ct. 1441 (quoting *Dodge v. Board of Education,* 302 U.S. 74, 79, 58 S.Ct. 98, 82 L.Ed. 57 (1937)); *see also United States Trust,* 431 U.S. at 17 n. 14, 97 S.Ct. 1505 ("[A] statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State.") Put simply, the legislative intent to create a contract must be "clearly and unequivocally expressed." *Atchison,* 470 U.S. at 466, 105 S.Ct. 1441.

Plaintiffs assert the law in this circuit is that employees "have contractual rights in pension plans." *State of Nevada Employees Ass'n v. Keating,* 903 F.2d 1223, 1227 (9th Cir.1990). In *Keating,* the issue of whether the public employees retirement system created contractual rights for employees had been decided by the Nevada Supreme Court in *Washoe County, infra.* Instead of focusing on whether a contract existed, *Keating* explores whether the Nevada legislature's 1983 amendment to their PERS legislation constituted a "substantial impairment" to a contract that was "reasonable and necessary." The Ninth Circuit concluded "that the changes in Nevada's public employees' pension scheme were not necessary." *Id.* at 1228. Consequently, the Ninth Circuit held "that the Nevada legislation unconstitutionally impaired the State's contractual obligations." *Id.* But *Keating* does not go as far as plaintiffs suggest. It does not hold that ***1100** employees are entitled to an inalterable level of benefits. Rather, the Ninth Circuit found in *Keating* that, based on the prior pronouncement of the Nevada Supreme Court, the benefits at issue were unconstitutionally impaired.

Plaintiffs also rely on *Oregon State. Police Officers' Assoc. v. State. of Oregon,* 323 Or. 356, 918 P.2d 765 (1996) ("OSPOA"). In that case, the Oregon Supreme Court found the

PERS scheme creates a contract between the state and its employees. Defendants urge this court not to follow OSPOA, arguing it is a plurality decision that defendants are now challenging before the Oregon Supreme Court. While defendants pursue their challenge in state court, this court must consider OSPOA to remain a valid statement of Oregon law.

Consequently, while this court finds nothing in the PERS statute that explicitly creates a contract, the Oregon Supreme Court has found a contract to exist. Following the logic of *Keating,* which relies on a prior Nevada Supreme Court decision finding the existence of a contract, this court defers to the *OSPOA* decision and finds that the Oregon PERS scheme does create a contract.

The next question is to determine what sort of a contract PERS establishes and whether the Reform Legislation substantially impairs that contract.

STEP TWO: DOES THE REFORM LEGISLATION CONSTITUTE A SUBSTANTIAL IMPAIRMENT OF A CONTRACTUAL RELATIONSHIP?

Plaintiffs assert that the PERS contract establishes for employees a right to a fixed level of benefits. Those benefits, according to plaintiffs, may be increased (as they have been in the past) but never reduced.

Plaintiffs again urge the court to follow *OSPOA*. In *OSPOA*, the Oregon Supreme Court held that a *prospective* amendment to the PERS statutes violated the federal Contract Clause. 323 Or. at 375, 380-81, 918 P.2d 765. Defendants assert that *OSPOA* is not good law on this point and should not be

followed by this court. This court has already followed *OSPOA* on the state law issue of whether the PERS statutes create a contract. However, this court is not obligated to follow state court pronouncements on federal law and, therefore, *OSPOA* is not instructive on whether the PERS statutes violate the federal Contract Clause. This is especially true because *OSPOA* relies on state and not federal case law.

Defendants argue the plain language of the PERS statutes fails to show a clear legislative intent to create a contractual obligation on behalf of the State of Oregon that can never be prospectively amended or altered. *See National Educ. Ass'n-Rhode v. Retirement Bd.,* 172 F.3d 22, 28-29 (1st Cir.1999)(analyzing whether plain language of Rhode Island pension plan created future inalterable benefits).

Such an omission in the PERS statutes is important. The Contract Clause does not prohibit legislation that operates prospectively. *See United States Trust,* 431 U.S. at 18 n. 15, 97 S.Ct. 1505 ("States undoubtedly [have] the power to repeal the covenant prospectively.") (citing *Ogden v. Saunders,* 25 U.S. (12 Wheat) 213, 6 L.Ed. 606 (1827)). If the State of Oregon is to be bound to provide employees a set level of benefits in perpetuity, such a legislative intent must be clear. Here it is not. The court finds nothing in ORS §§ 238.200, 238.205 and 238.250 giving plaintiffs a right to a fixed level of future PERS benefits. *See Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 504, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) ("we begin by identifying the precise contractual right that has been impaired and the nature of the statutory impairment.").

***1101** Plaintiffs additionally argue that *Keating* guarantees that public employees "gained a right not only to what was in their accounts, but also to the terms in existence at the time of their

employment for future service." (Plaintiffs' Memo. in Response to Motion for Summary Judgment, p. 25). Put another way, plaintiffs argue an employee secures a right to future benefits based on partial performance, analogous to a unilateral contract. But the dicta cited by plaintiffs from *Keating* does not support plaintiffs' position that the PERS statutes create a unilateral contract guaranteeing a right to a previously established level of retirement benefits *ad infinitum.* Because the court finds that the PERS contract does not guarantee prospective benefits for future work, the Contract Clause is only affected if the Reform Legislation operates retrospectively.

The court next turns to whether the Reform Legislation has a retroactive effect: whether it alters accrued benefits for completed work. Consequently, each claim for relief is addressed in turn.

First Claim for Relief: HB 2003, Section 1; Elimination of Employees Accounts

Plaintiffs complain that ORS § 238.200, which once required 6% of a member's salary to be placed into an individual account, now requires employers to place funds in a "transitional account" effective January 1, 2004. (Complaint, ¶¶ 23 & 24). The result, according to plaintiffs, is that "the benefits plaintiffs will receive upon retirement as calculated under ORS § 238.200 will be substantially reduced." (*Id.*, ¶ 24). Plaintiffs assert this change unconstitutionally impairs the contract between public employees and the State of Oregon in violation of the Contract Clause. (*Id.*, ¶ 25).

Plaintiffs do not show how prospectively changing the PERS "individual account" into a new "transition account" results in

any reduction of value of member accounts. The court finds nothing in the statute to conclude that the change to section 1 results in a retroactive reduction to the value of a member's account for past service. In fact, the statutory amendment itself provided that change to transitional accounts would not occur until after *January 1, 2004.* The Reform Legislation leaves untouched member accounts in existence before January 1, 2004. No violation of the Contract Clause can be proven and summary judgment favoring defendants is appropriate on the First Claim for Relief.

Second Claim for Relief: HB 2003, Sections 5 & 6; Elimination of Guaranteed Rate

Plaintiffs allege that prior to the enactment of sections 5 and 6 of HB 2003, ORS § 238.255 guaranteed earnings on their accounts of at least 8%. (*Id.*, ¶ 31). They allege sections 5 and 6 of HB 2003 remove this 8% floor on growth, and thereby impair their PERS contract in violation of the Contract Clause. (*Id.*, ¶¶ 32 & 33).

Actually, the PERS statutes do not guarantee any specific rate of earnings, but instead provide for the crediting at "the assumed interest rate for that year as determined by the board." ORS § 238.255. Consequently, even prior to the Reform Legislation, PERB had discretion in setting the assumed interest rate and could raise or lower it for any year.

In any event, while sections five and six do create the possibility of lower future benefit calculations for members (should their transitional accounts not earn at least eight percent) there is no evidence that such changes affect past, accrued benefits and are, therefore unlawful. PERS members

were never entitled to have any particular rate of interest credited to their account for work already performed. *A fortiori,* they were never entitled to a *1102 guaranteed rate of interest into the future. Consequently, the second claim for relief does not violate the Contract Clause as it operates prospectively.

Third Claim for Relief: HB 2003, Sections 5 & 6; Repayment of Deficit

In the third claim for relief, plaintiffs maintain that sections five and six also modified ORS § 238.255 by removing a guarantee that the gain-loss reserve not be in deficit for more than five years. (*Id.*, ¶ 37). Prior to the Reform Legislation, public employers were responsible for paying for any deficit in the reserve, with a guarantee they would not have to do so for more than five years. (*Id.*) Plaintiffs assert that the legislative change to ORS § 238.255(1) may reduce the earnings on a vested member's account in five years.[FN2]

> FN2. ORS § 238.255(1)(2001) provides, in relevant part, that:
> From time to time, the board shall determine the liabilities of the system and shall set the amount of contributions to be made by participating public employers, and by other public employers who are required to make contributions on behalf of members to ensure that those liabilities will be funded no more than 40 years after the date on which the determination is made.

The court cannot know whether this modification could apply

retroactively until several years from today. If the provision did apply retroactively, say by changing benefits that would have accrued in 2002, then a plaintiff may have a valid claim under the Contract Clause. Today, however, it is purely speculative to assume that the gain-loss reserve will be in a deficit in the future. *See Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir.1996) (federal courts normally ought not resolve issues "involv[ing] contingent future events that may not occur as anticipated, or indeed may not occur at all.") (quoting *Railroad Reorganization Act Cases*, 419 U.S. 102, 140, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974) and *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985)). No Contract Clause claim is ripe under the third claim for relief.

Fourth Claim for Relief: HB 2003, Sections 7 & 8; Change in Method of Crediting Accounts

Under former ORS § 238.255, each PERS member account was credited with either earnings or the assumed interest rate at the end of each year. (*Id.*, ¶ 44). Sections 7 and 8 of HB 2003, however, changed the minimum crediting of plaintiffs' accounts to a career-long basis, arguably reducing future benefits and, according to plaintiffs, violating the Contract Clause. (*Id.*, ¶¶ 45 and 46).

There are no facts indicating that plaintiffs' fourth claim for relief applies retroactively. The amounts already accrued in a member's account remain unaltered. The fourth claim for relief does not apply retroactively and thus does not establish a violation of the Contract Clause.

Fifth and Seventh Claims for Relief: HB 2003, Sections 9, 10 & 14b(1)(A); COLA Remedy in *City of Eugene v. State of Oregon*

Plaintiff Hathhorn is retired and receives PERS benefits. (*Id.*, ¶ 63). Plaintiff Hathhorn challenges Sections 9, 10 & 14b(1)(a) of HB 2003, which lower the 1999 earnings credit and withhold COLA benefits until excess benefit contributions are recovered.[FN3] (*Id.*, ¶ 66).

> FN3. In *City of Eugene v. State of Oregon,* Marion County No. 99C-12794, an Oregon circuit court held that PERB incorrectly calculated PERS member benefits in violation of law. (*Id.*, ¶ 65).

ORS § 238.715 allows PERB to recover any excess payment from a member who received an amount greater than their legal entitlement. In HB 2003 9, 10 & ***1103** 14b(1)(a), the legislature made a determination that in order to comply with the *City of Eugene* decision, the amount of overpayment made in 1999 would be adjusted by reducing the COLA in 2004 and by lowering the earnings credit for 1999 to 11.33 percent. These decisions do not have a retroactive effect. They have a curative effect. Stated another way, the law does not retroactively reduce lawful benefits, it reduces unlawfully accrued benefits. Similarly, it would be proper for the legislature to overcompensate with a COLA adjustment and an increased earnings credit if a court were to find that a prior year's earnings were understated.

The adjustments lower a future benefit to cover a past overpayment and are consistent with ORS § 238.715, which existed prior to the Reform Legislation. PERB has always had

the right to recoup overpayments. Sections 9, 10 & 14b(1)(a) were not passed to diminish an existing contract, but to enforce the contract as constituted between the State and members. There is no impairment of the Contract Clause as there is no retroactive change to the contract between the State and PERS members.

Sixth Claim for Relief: HB 2003, Section 3; Elimination of Right to Invest in Variable Account

Prior to the enactment of Section 3 of HB 2003, ORS § 238.260 provided that PERS members could contribute into a variable account to purchase a variable annuity upon their retirement. Plaintiffs Robertson, Carlisle, Bowler and DeJarnett elected to make such contributions. (*Id.*, ¶ 57). Section 3 of HB 2003, effective January 1, 2004, eliminated the ability to make such variable account contributions. Plaintiffs allege this change will lower their benefit upon retirement and violates the Contract Clause. (*Id.*, ¶¶ 58 & 59).

This claim, like others, is based on plaintiffs' theory that the Contract Clause protects against future harm to plaintiffs for future work. Because the court has concluded that the PERS contract here does not prohibit modification of future benefits for future work, summary judgment is appropriate as plaintiffs fail to state a cognizable Contract Clause claim. The change in the Variable Account was prospective only; member's past contributions were untouched and remain in a Variable Account.

Eighth Claim for Relief: HB 2003, Section 14b(1)(b); Reduction of Current Employee Accounts to Enforce *City*

Similar to the Seventh Claim for Relief, this claim alleges that section 14b(1)(b) of HB 2003 considers excess payments in 1999 to be administrative expenses charged to future earnings on active member accounts. (*Id.*, ¶ 72). Again, the legislature made a determination to recoup unlawfully credited earnings, an act that is not a violation of the PERS contract.

Ninth Claim for Relief: HB 2003, Section 14(b)(2); Employers Not Responsible for Mistaken Benefits

Under ORS § 238.255, employers are required to "fund PERS in an amount determined to be actuarially necessary to adequately fund the promised benefits." (*Id.*, ¶ 77). Under HB 2003, section 14(b)(2) an "employer's liability to fund the plan is limited by excluding any amount mistakenly paid from that funding obligation." (*Id.*, ¶ 78). The effect, according to plaintiffs, is that the PERS system will no longer be actuarially sound. This claim too does not retroactively diminish accrued benefits, but operates on a going-forward basis and, therefore, does not violate the Contract Clause. Additionally, it is speculative and would only be ripe at a later date.

***1104 Tenth Claim for Relief: HB 2004, Section 4; Retroactive Change of Actuarial Equivalency Factor Tables**

HB 2004, section 4, requires PERB to adopt new actuarial equivalency factors which, plaintiffs allege, are applied retroactively and thus reduce benefits.

In the *City of Eugene* litigation, the Marion County Circuit Court found the PERB violated ORS § 238.300 by using outdated actuarial factors to calculate member retirement benefits. As a result, member benefits were higher than they legally should have been because the annuity was not "actuarially equivalent" to the member's account balance. In response to this problem, HB 2004 directs the PERB to adopt new equivalency factors once every two calendar years.

HB 2004 is consistent with the former PERS contract provision which required PERB to adopt new actuarial equivalency factors from "time to time." *See* ORS § 238.630(3)(g). By requiring the Board to follow the law, and utilize up-to-date actuarial tables, HB 2004 section 2 does not violate the PERS contract and does not therefore violate the Contract Clause.

III. CONCLUSION

In analyzing the threshold inquiry for determining whether the Contract Clause has been violated, plaintiffs falter at the second step. Plaintiffs cannot show the Reform Legislation impairs any obligation under the PERS contract. The court concludes as a matter of law the PERS statutes do not guarantee a specific level of future benefits for future work. The legislative changes here are either prospective, curative, or consistent with the pre-existing terms of the contract. While the court finds that a contract exists, no obligation of that contract is violated. Thus, the initial inquiry for determining whether legislation violates the Contract Clause is not met. Defendants' motion for summary judgment is GRANTED. For these same reasons, plaintiffs' motion for summary judgment is DENIED.

Intervenor Marion County's motion for summary judgment and

adoption of defendant Kulongoski's memorandum in support (# 29) is GRANTED. Members of PERB's motion for joinder in defendant Kulongoski's motion for summary judgment (# 28) is GRANTED.

IT IS SO ORDERED.

APPENDIX C

ORS 238.300 (2001):

"PERS members "shall receive a service retirement allowance which shall consist of the following annuity and pensions:

> (1) A refund annuity which shall be the actuarial equivalent of accumulated contributions by the member and interest thereon credited at the time of retirement, * * *
>
> (2)(a) A life pension (nonrefund) for current service provided by the contributions of employers, which pension, subject to paragraph (b) of this subsection, shall be an amount which, when added to the sum of the annuity under subsection (1) of this section * * * results in a total of:
>
> (C) For service as other than a police officer, firefighter or member of the Legislative Assembly, 1.67 percent of final average salary multiplied by the number of years of membership in the system as other than police officer, firefighter or member of the Legislative Assembly before the effective date of retirement
>
> (b) a pension under this section shall be at least:
>
> (A) The actuarial equivalent of the annuity provided by the accumulated

contributions of the member."

ORS 238.200(1)(a) (2001):

> "(1)(a) An active member of the system shall contribute to the fund, and there shall be withheld from salary of the member six percent of that salary."

ORS 238.250 (2001)

> "The Board shall provide for a regular account for each active and inactive member of the system who has made a contribution to the fund. The regular account of the member shall show the amount of the member's contribution to the fund and the interest which they have earned . . ."

FILED 12-07-06

APPENDIX D
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM ROBERTSON; et al.,	No. 04-35898
Plaintiffs - Appellants,	D.C. No. CV-03-00999 -MWM
MARION COUNTY,	District of Oregn, Portland
Intervenor - Appellee,	
V.	ORDER
THEODORE KULONGOSKI; et al.,	
Defendants - Appellees.	

Before: SILVERMAN and GOULD, Circuit Judges, and RHOADES, *District Judge

The panel has voted to deny appellants' petition for rehearing. Judges Silverman and Gould have voted to reject the petition for hearing en banc and Judge Rhoades so recommends.

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* The Honorable John S. Rhoades, Sr., Senior United States

District Judge for the Southern District of California, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is REJECTED.